Supreme Court, U.S.
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No. 89-1849

In The

Supreme Court of the United States

October Term, 1990

GERALD E. MANSELL,

Petitioner,

v.

GAYE M. MANSELL,

Respondent.

On Petitions for Writs of Certiorari or Mandamus to the California Court of Appeal, Fifth District, or for Entry of Judgment

RESPONDENT'S BRIEF IN OPPOSITION TO PETITIONS FOR WRITS OF CERTIORARI, OR MANDAMUS, OR FOR ENTRY OF JUDGMENT

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QUESTION PRESENTED FOR REVIEW

The question presented for review by the Petition for Writs of Mandamus or Certiorari should properly be phrased as follows:

Does the United States Supreme Court have jurisdiction to set aside a state court judgment which is based on the doctrine of res judicata after the Petitioner failed to file an appeal or motion to set aside the judgment within the statutory time limits and/or where the Petitioner failed to show grounds of mutual mistake of law as set forth by California law?

LIST OF PARTIES

PETITION FOR WRIT OF MANDAMUS OR ENTRY OF JUDGMENT:

Petitioner, Gerald E. Mansell

Respondent, Court of Appeal of California, Fifth Appellate District; the Honorable James Ardaiz, William Stone, and George Brown, Justices of the Court of Appeal of California, Fifth Appellate District

PETITION FOR WRIT OF CERTIORARI:

Petitioner, Gerald E. Mansell

Respondent, Gaye M. Mansell

OTHER

Attorney General of the State of California

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STATUTES INVOLVED

The only statute actually involved in this matter is California Civil Code of Procedure § 473, which applicable parts are set forth in full at Appendix A.

STATEMENT OF THE CASE

Respondent (hereafter "WIFE") disputes Petitioner's (hereafter "HUSBAND") Statement of the Case in his Petition and therefore sets forth the following pertinent facts:

1. HUSBAND and WIFE signed a stipulated settlement agreement which was incorporated into the judgment in 1979.

2. Both parties were represented by counsel.

3. HUSBAND did not take an appeal against the judgment.

4. HUSBAND did not file a motion to vacate the judgment within the time limits set forth in California Code of Civil Procedure § 473.

5. HUSBAND filed a motion to modify the judgment based upon equitable grounds in 1983, and that motion was denied.

6. The California Fifth District Court of Appeal (hereafter "5th DCA") affirmed the trial court's decision in 1987 and the California Supreme Court denied review (the first opinion hereafter referred to as *"Mansell I"*).

7. This Court reversed and remanded on May 30, 1989, and in its opinion stated the issue of res judicata was an independent state ground over which it held no jurisdiction.

8. The 5th DCA issued its second opinion, *Mansell v Mansell,* 216 CA3d 937, 265 CR 227 (1989), modified 217 CA3d 219 (1990) (hereafter *"Mansell II"*) on December 18, 1989, clarifying its original opinion which discussed the federal question, stating the resolution of the federal question was unnecessary to find the judgment could not be reopened for modification since:

a) it was a *pre-McCarty* judgment *(McCarty v McCarty,* 453 U.S. 210 (1981) and

b) HUSBAND failed to establish a mutual mistake of law which might have justified granting his motion, thus, HUSBAND'S motion was barred by res judicata.

9. The California Supreme Court denied HUSBAND'S request for hearing on March 29, 1990.

10. Garnishment of HUSBAND'S disability pension has never been in effect at anytime in this proceeding.

HUSBAND states in his Petition, at page 6, WIFE failed to preserve her objections to HUSBAND'S standing to seek review under California Rule of Court 28(e)(5). *Mansell II* addressed this contention and found it had no merit.

RESPONDENT'S BRIEF IN OPPOSITION TO PETITION FOR WRITS OF MANDAMUS OR CERTIORARI

I

NO REVIEWABLE QUESTION IS PRESENTED

HUSBAND had three remedies available to avoid the judgment in question. He could have:

1. filed an appeal from the judgment.

2. filed a motion to vacate or modify the judgment within six months after entry of the judgment pursuant to California Code of Civil Procedure § 473.

3. filed a motion to vacate or modify the judgment upon equitable grounds showing extrinsic fraud or mutual mistake of law. *In re Marriage of Stevenot,* 154 CA3d 1051, 202 CR 116 (1984).

HUSBAND failed to file an appeal against the 1979 judgment, failed to file a motion to vacate the 1979 judgment within the statutory time limits, and failed to show a mutual mistake of law (the only equitable ground he asserted) which would justify modification of a four year old judgment incorporating a stipulated agreement voluntarily signed by HUSBAND.

Just as in his original Jurisdictional Statement bringing *Mansell v. Mansell,* (No. 87-201) ___ U.S. ___, 109 S.Ct. 2023 (May 30, 1989), before this Court in 1987, HUSBAND has again failed to mention to this Court the judgment was based upon a *stipulated* property settlement.

II

THE PETITION DOES NOT SHOW UNITED STATES SUPREME COURT JURISDICTION

The Petition does not request this Court to take jurisdiction regarding the opinion of the trial court or *Mansell*

I. The Petition challenges *Mansell II* which is based on this Court's own conclusion it has no jurisdiction if, after remand, the 5th DCA decided this matter on a finding of res judicata. (See *Mansell v Mansell*, supra, at footnote 5. Also see the "Official Transcript of Proceedings Before the United States Supreme Court, *Mansell v. Mansell*, January 10, 1989", page 33, line 12 through page 35, line 24, especially at page 35, lines 3 through 8, included at Appendix B). *Mansell II* addresses no federal question, it does not deal with the merits of any federal question, it does not deal with garnishment of disability pay.

The finding of *Mansell II* is the trial court did not abuse its discretion in 1983 by refusing to reopen the judgment due to the independent state ground of res judicata. Res judicata is based on HUSBAND'S failure to file an appeal or motion to vacate within the statutory time limits and failure to show mutual mistake of law.

Mansell II plainly states since this is a pre-*McCarty* case, and California courts have not made *McCarty* retroactive, the judgment is final. Thus, whether California courts correctly or incorrectly interpreted federal law two years before *McCarty*, HUSBAND made no showing of mutual mistake and the case rests on res judicata. Even if *McCarty* had been retroactive, HUSBAND waited to file his motion two years after it came into being.

HUSBAND seeks this Court's assistance in evading his responsibility of abiding by a judgment based upon a stipulated property settlement signed and entered four years before he ever sought to vacate it.

III

ON REMAND, A STATE APPELLATE COURT MAY APPLY LAWS BASED SOLELY UPON INDEPENDENT STATE GROUNDS

This Court has previously remanded cases back to state courts which issued rulings based upon independent state grounds thus upholding their original rulings on different grounds [See *Paschal v Christie-Stewart, Inc.*, 414 U.S. 193 (1973); *Kirkpatrick v Christian Homes of Abilene, Inc.*, 460 U.S. 1074 (1983)]. As stated above, this Court has invited California to do the same, both in its statements during oral arguments and in its opinion.

IV

MANSELL II STATED WIFE WAS NOT PRECLUDED FROM RAISING RES JUDICATA ON REMAND DESPITE CALIFORNIA RULE OF COURT 28(e)(5)

Common sense and *Mansell II* dictate WIFE was not required to expend more time and money cross-appealing an issue after she had won, regardless of California Rule of Court 28(e)(5) (See Petition, page 6). Indeed, nothing prohibits California courts from addressing an issue whether or not raised by the parties. As *Mansell II* stated, this is an advisory rule for the courts. WIFE is aware of no conceivable federal question relating to this matter.

California makes its own rules governing purely state actions. This Court has no jurisdiction to tell California how to interpret its own Rules of Court having no effect on federal issues as HUSBAND implies.

V

38 U.S.C. 3101 IS NOT AT ISSUE IN *MANSELL II*

As stated previously, *Mansell II* rests entirely on the independent state ground of res judicata. Therefore 38 U.S.C. 3101 is not before this Court as claimed by HUSBAND.

HUSBAND raised this statute in *Mansell I*, *Mansell v Mansell*, and now in *Mansell II*. The California courts, this Court, and even the Solicitor General in his amicus brief filed in *Mansell v Mansell* on behalf of HUSBAND have stated this case can be resolved without ever addressing this argument, yet HUSBAND insists on raising a long dead issue.

Dated: June 25, 1990

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APPENDIX A

California Code of Civil Procedure § 473 (at Paragraph 3):

> "The court may, upon such terms as may be just, relieve a party of his or her legal representative from a judgment, order, or other proceeding taken against him or her through his or her mistake, inadvertence, surprise, or excusable neglect. Application for such relief must be accompanied by a copy of the answer or other pleading proposed to be filed therein, otherwise the application shall not be granted, and must be made within a reasonable time, in no case exceeding six months, after such judgment, order, or proceeding was taken; provided, however, that, in the case of a judgment, order or other proceeding determining the ownership or right to possession of real or personal property, without extending the six-month period, when a notice in writing is personally served within the State of California both upon the party against whom the judgment, order or other proceeding has been taken, and upon his or her attorney of record, if any, notifying said party and his or her attorney of record, if any, that such order, judgment or other proceeding was taken against him or her and that any rights said party has to apply for relief under the provisions of Section 473 of the Code of Civil Procedure shall expire 90 days after service of said notice, then such application must be made within 90 days after service of such notice upon the defaulting party or his or her attorney of record, if any, whichever service shall be later. No affidavit or declaration of merits shall be required of the moving party. Notwithstanding any other requirements of this section, the court shall, whenever an application for relief is timely, in proper form,

and accompanied by an attorney's sworn affidavit attesting to his or her mistake, inadvertence, surprise or neglect, vacate any resulting default judgment entered against his or her client unless the court finds that the default was not in fact caused by the attorney's mistake, inadvertence, surprise, or neglect. The court shall, whenever relief is granted based on an attorney's affidavit of default, direct the attorney to pay reasonable compensatory legal fees and costs to opposing counsel or parties.

APPENDIX B

OFFICIAL TRANSCRIPT
PROCEEDINGS BEFORE
THE SUPREME COURT
OF THE
UNITED STATES

CAPTION: GERALD E. MANSELL, Appellant V. GAYE (MANSELL) FORBES

CASE NO: 87-201

PLACE: WASHINGTON, D.C.

DATE: January 10, 1989

PAGES: 1 thru 51

* * *

(p. 33) before the California Supreme Court.

That was an enabling statute. And so if the – for example, if you rule in favor of Major Mansell you will not only be guaranteeing him his disability benefits, because the relief he is specifically requesting is that that entire enabling paragraph be eliminated.

So Gaye Mansell would receive nothing. No longevity, no disability. And he is asking that you do this four years, now ten years after the entry of the agreement and the judgment.

QUESTION: But why – there doesn't seem to be anything in the California decision saying that this can't be reopened.

MR. CORNELL: There was nothing in the California decision on – yes, that said it could be reopened. There

was nothing there that said it could or could not be reopened.

What the California Court of Appeal did was rule on the appeal. They didn't say that it was barred by res judicata. They didn't say it would not be barred by res judicata.

QUESTION: You're really saying that there is a way that you could win this case but on a ground the court below didn't use.

(p. 34) MR. CORNELL: Yes.

QUESTION: Please affirm on the grounds of res judicata.

MR. CORNELL: Yes. And if this Court rules contrary to me, I believe I can return to that court and have a ruling on that.

The fact that they did not rule on that basis doesn't mean –

QUESTION: Well, the court below disposed of it on – disposed of it on this other ground, though, that, that California can – can – needn't take that – can disregard the waiver of the retirement pay.

MR. CORNELL: Yes.

QUESTION: Which really is a ruling on the merits. You would think that, if the California Court of Appeal thought that res judicata were appropriate, they would not have reached the merits.

MR. CORNELL: I don't know. I can't speculate as to why they did or did not.

QUESTION: Does California have a rule that they do not reach federal or Constitutional questions unless there's necessity to do so?

MR. CORNELL: I'm not aware of such a rule. There is a clear rule in California, the judgments final before the effective date of McCarty are not reopenable, (p. 35) and are subject to res judicata. And I have cited those in the briefs.

QUESTION: In any case, that's a state law question. Why should we decide the state law question of whether this is res judicata or not? Why can't we just decide the federal law question and, as you say, if it is res judicata, the California court will say so, when it's sent back.

MR. CORNELL: If there's an express reservation to that effect in the opinion of the Court, then I think it would be appropriate.

However, if there isn't, then what you've done is say that all of the judgments that were entered prior to the McCarty decision are now wide open and subject to relitigation, and all agreements are set aside.

QUESTION: (Inaudible) if we decide on the merits, you may win.

MR. CORNELL: I would certainly hope so, Your honor. That's why I'm here.

QUESTION: Did you argue res judicata to the California Court of Appeal?

MR. CORNELL: Yes. I did.

QUESTION: And they said nothing about it?

MR. CORNELL: They said nothing about it. Now, what is the third interest here that's before you

* * *